No. 91-279

In The

Supreme Court of the United States

LECHUZA VILLAS WEST,
a California limited partnership,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, STATE OF CALIFORNIA, STATE LANDS COMMISSION, and MALIBU-ENCINAL HOME OWNERS ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to California Public Resources Code § 6342, the State Lands Commission and private parties may enter into boundary line agreements "describing and defining the boundary line between [public] tidelands and adjacent uplands" owned by those parties. Pursuant to Public Resources Code § 6357, the Lands Commission and private parties may, if they are unable to reach agreement, establish such boundary lines by an "action to quiet title."

The first question presented for review is whether, in a quiet title action authorized by Section 6357, the trial court is empowered actually to "describe and define" a coastal boundary line according to a methodologically sound formula and the facts determined at trial, or is limited to declaring merely that the boundary is a constantly shifting line that moves from day to day.

The second question presented for review is how the absolute and direct conflict between the holding of the First District Court of Appeal in *People v. William Kent Estate Co.*, 242 Cal.App. 2nd 156 (1966), that a coastal boundary line may be fixed at the average mean high tide line, and of the Second District Court of Appeal in this case, that such a boundary line is constantly moving and may never be fixed, will be resolved.

Finally, the third question presented for review is whether the Court of Appeal erred in this case in adding a new requirement to the century old rule of avulsion, requiring that for the avulsion exception to the moving

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coastal boundary rule a change in the boundary must be not only "sudden and perceptible," but also, for the first time, "unexpected."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lechuza Villas West ("Lechuza") respectfully petitions this Court for review of a decision by the California Court of Appeal, Second Appellate District, which reversed the judgment of the trial court quieting title in Lechuza's boundary dispute with respondents the State of California and its agencies. In denying trial court's any authority to fix the boundaries between public tidelands and adjacent uplands, the decision of the Second Appellate District conflicts with published decisions of the First Appellate District granting trial courts this very authority, and requiring that they exercise it in appropriate circumstances. Not only are the lower courts split regarding whether tideland boundaries may be fixed by judicial decree, but the issue is an recurring one in a State with hundreds of miles of coastal and other tidal waterways.

Moreover, the Court of Appeal clearly erred in misapplying the century old rule of avulsion which also requires the determination of fixed boundaries in certain circumstances. The significance of the issue presented for review is magnified by the longstanding public interest in fixed and certain title boundaries and by the potentially devastating effects that the Court of Appeal's ruling will have on the economic viability of costly coastal properties.

STATEMENT OF THE CASE

OPINIONS

The order of the Supreme Court of California denying Lechuza's petition for discretionary review is unreported; it appears at Appendix A to the petition. The opinion of the California Court of Appeal is unreported; it appears at Appendix B to the petition. The prior opinion of the California Court of Appeal is reported as *Lechuza Villas West v. California Coastal Commission,* 60 Cal.App. 4th 218 (1997).

JURISDICTION

The opinion and judgment of the California Court of Appeal were entered on December 21, 2000. Petition Appendix (Pet.App.) B-1. Lechuza's timely petition for discretionary review to the California Supreme Court was denied on March 14, 2001. Pet.App. A-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

A. The Subject Property.

The property at issue consists of 19 beachfront lots, Lots 141 through 156, of Tract 10630 as recorded in Book 181, Pages 6-11 of Maps in the official records of the County Recorder of Los Angeles County ("the subject property"). [9 JA 2303.] The tract map for the subject property, which was approved and recorded by the County of Los Angeles in 1932, delineates exact boundaries for each of the lots, including a precise seaward boundary. [5 JA 1010.] The existing zoning for the property allows for the construction of a single-family home on each of the already-subdivided lots. [9 JA 2304.] Tract 10630 is approximately 80 percent developed with single-family residences. *Id.* The subject property is situated adjacent to recently approved beachfront homes constructed in the same manner as Lechuza has proposed. *Id.*

B. Lechuza's Due Diligence.

Prior to acquiring any of the lots, Lechuza undertook extensive research of the recorded documents, the surrounding uses, and the Coastal Commission's approval of residential development on several adjacent beachfront lots. [9 JA 2306.] Lechuza knew that the Coastal Commission had recently approved several other homes on the same beach in Tract 10630 without any issue having ever been raised regarding the seaward boundary of the property or any public easement across such property. *Id.* Prior to purchasing the subject property, Lechuza also determined that residential use of the subject property was consistent with the County Land Use Plan which the Coastal Commission certified as consistent with the State Coastal Act. *Id.*

1. The State Lands Commission Determination Letters.

Before closing escrow, Lechuza sought and received determination letters from the State Lands Commission indicating that the State was unaware of any claim that it had to any portion of the subject property. [10 JA 2405-34.] The 13 separate letters Lechuza received were similar or exactly the same as the letters neighboring property owners had received from the Lands Commission with regard to their now-developed properties in the same tract on Lechuza Beach. [10 JA 2364-65.] Prior to this case, the Lands Commission had never revoked a determination letter issued for a proposed beachfront development. [9 JA 2308.]

2. The State Approved Other Beachfront Homes On Lechuza Beach Immediately Prior To Plaintiff's Purchase Of Subject Property.

In 1988 and 1989, the State approved the construction of two other beachfront homes located in the same tract as the subject property. [10 JA 2363.] In connection with those projects, the property owners sought and obtained State Lands Commission determination letters, which stated that the State made no claim of public ownership to those beachfront properties. *Id.* The projects were subsequently approved by the Coastal Commission without any issue having been raised regarding the seaward boundary of the properties or any public easement landward of such boundary. [10 JA 2363, 2376-83.] The two approved homes are located only a few hundred yards from the subject property. [10 JA 2363.]

C. Lechuza's Repeated Unsuccessful Attempts To Gain Coastal Commission Approval Of Any Use Of Its Property.

1. Lechuza's First Development Proposal.

In October 1990, Lechuza filed applications with the Coastal Commission to construct four single-family homes on each of four of the subject lots. [1 JA 004-5.] Lechuza submitted with each application detailed geological reports, soils reports, engineering reports, wave uprush studies, and the approvals in concept received from Los Angeles County, as well as the above-referenced State Lands Commission determination letters stating that the State made no claim of public ownership or easement affecting the proposed homes. [9 JA 2307.] All of the proposed houses were to be constructed landward

of the "stringline" of the existing homes on this beach.[1] [9 JA 2310.] On January 10, 1991, the Coastal Commission denied those applications. *Id.*

Importantly, the Commission's findings made no claim that Lechuza's construction would encroach upon State lands. [14 JA 3707-25.] Lechuza challenged the Coastal Commission's denial in a Petition for Writ of Mandate filed March 8, 1991. [9 JA 2311.]

2. Lechuza's Second, Reduced Development Proposal.

Lechuza then made a second series of applications to the Coastal Commission for the approval of homes on each of five other lots, again submitting detailed geological reports, soils reports, engineering reports, wave uprush studies, and the approvals in concept received from Los Angeles County, as well as the required State Lands Commission determination letters. [9 JA 2312.] Led to believe that the Coastal Commission's primary reason for denying its first set of applications was the size of the infrastructure accompanying the residences, Lechuza significantly reduced the scale of its proposal in the second set of permit applications. [14 JA 3727-48.]

On April 11, 1991, the Coastal Commission unconditionally denied Lechuza's second set of permit applications. [9 JA 2312.] On June 10, 1991, Lechuza filed a second Petition for Writ of Mandate against the Coastal Commission. [9 JA 2312.]

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[1] The building "stringline" or "build-to" line is derived by determining the line between the seaward most extensions of the existing buildings on either side of vacant beachfront property. It is the Coastal Commission's standard policy not to allow new construction to extend seaward of this line.

3. Lechuza's Third, Further Reduced Development Proposal.

Lechuza made yet another set of permit applications to the Coastal Commission, proposing an even more reduced scale development than did the second set of applications. [14 JA 3749.] On December 10, 1991, the Coastal Commission unconditionally denied Lechuza's third set of permit applications. [9 JA 2314.] The Commission's findings again made no suggestions as to how Lechuza might modify its proposed development and, instead, made clear that it would approve nothing on Lechuza's property. [14 JA 3750-51.]

4. The *Lucas* Decision And The Coastal Commission's Reconsideration.

Lechuza sought and obtained the right to have the Coastal Commission reconsider the denial of all 16 permit applications following the decision of the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). [9 JA 2314.] The *Lucas* decision held that the regulatory denial of all economically viable use of privately owned property was an unconstitutional taking unless the action is necessary to prevent a nuisance or a land use prohibited by state law. *Lucas, supra*, 505 U.S. at 1027. For the denial not to constitute an unconstitutional taking prohibited by *Lucas*, the State determined upon reconsideration that any denial would need to be supported by grounds other than those set forth in the Coastal Commission's earlier findings. [9 JA 2314-15.] To that end, on November 4, 1992, the State first asserted its moving boundary claims, and the public easement claims which have already been rejected by this Court. *Id.*

5. The State's Moving Boundary Claim.

The State then claimed that the widely fluctuating mean high-tide line on Lechuza Beach constituted a moving seaward boundary between Lechuza's property and the public tidelands. [9 JA 2315-16.] On November 1992, the State Lands Commission revoked its previously-issued determination letters for the subject property and claimed for the first time ever that it had evidence that the proposed homes might encroach upon State lands, and that the public may have some kind of easement right even beyond the seaward boundary of the subject property. [9 JA 2315.]

Despite repeated requests to do so, the State Lands Commission, while stating that Lechuza could not make any use of its property until such time as it proved the location of the seaward boundary of its property, refused to make a specific claim to the location of the seaward boundary or to the location of the easement which allegedly existed beyond the seaward boundary. [9 JA 2315-16.]

The assertion of encroachment was only possible because the State claimed that the seaward boundary of Lechuza's property was the mean high-tide line as it fluctuated from day to day, up to 110 feet per year, according to surveys taken by the State's and MEHOA's experts. [10 JA 2317, 2344.] Since at times of severe winter erosion the mean high-tide line might extend over all of Lechuza's property, the State reasoned that no development could be permitted because the public owned all of Lechuza's property at least potentially at some point in time. [1 JA 0050; 9 JA 2315.]

6. The State's Final Denial.

On January 14, 1993, the Coastal Commission denied all 16 applications which had been consolidated for the post-*Lucas* rehearing. [9 JA 2322.] For the first time ever

the Coastal Commission based its denial on Lechuza's alleged lack of ownership of the property. [9 JA 2322.] On April 14, 1993, the Coastal Commission denied Lechuza's request for reconsideration. [9 JA 2327.]

7. Lechuza's Attempts To Obtain A Boundary Determination.

The State made it unquestionably clear that Lechuza could not make any use of the subject property until such time as it proved the location of the moving seaward boundary. [9 JA 2324-25.] Lechuza attempted to work with the State to establish a settled or agreed to boundary line upon which it could base future plans and permit applications. However, despite Lechuza's repeated requests to do so, the State refused to make any specific claim as to the location of the seaward boundary line or the location of the easement which it alleged existed beyond the seaward boundary. [9 JA 2315-16, 2323.] On July 14, 1993, the State Lands Commission formally rejected Lechuza's request to recognize an agreed boundary line for the subject property. [9 JA 2323.]

8. The State's Post-Denial Approval Of Residential Development On Identically Situated Lechuza Beachfront Parcels.

Even after the final denial of Lechuza's permit applications, the Coastal Commission approved the development of a home on the next developable beachfront lot adjacent to Lechuza's property. [9 JA 2323-24.] In approving that development in March 1993, neither the State Lands Commission nor the Coastal Commission made any claim regarding a moving boundary line or public easement rights beyond the boundary for that property located on the same beach and only a few hundred feet from the subject property. *Id.*

D. The Initial Writ Of Mandate Claim.

On March 15, 1993, Lechuza sought a writ of mandate challenging the State's ultimate denial of all of Lechuza's coastal development permit applications. [1 JA 001.] Lechuza claimed that the denial of the applications deprived Lechuza of all economically viable use of its property and constituted an unconstitutional taking without just compensation. [1 JA 0031-33.] On December 23, 1994, the trial court denied Lechuza's writ and directed Lechuza to quiet title to the property before any further action could be taken with respect to Lechuza's inverse condemnation claim against the State. [2 JA 401-10.] Since, as the trial court recognized, the State's moving boundary theory precluded Lechuza from "establish[ing] the proper boundaries of its property," Lechuza was now forced to quiet title against its own property and seek a judicial determination of the location of the moving seaward boundary. [2 JA 408.]

E. The First Quiet Title Trial.

Lechuza then amended its Complaint to quiet title and establish a seaward boundary against the State and MEHOA. [3 JA 724.] Also at issue in the quiet title action was the State's claim of a public navigational easement over all portions of the subject property covered from time to time by the ebb and flow of the ocean tide, as well as the State's admittedly factually devoid public prescriptive easement claim. [4 JA 769.]

After a six-week trial on the boundary location and the express and navigational easement issues presided over by Judge Ernest Hiroshige, Lechuza prevailed against the State's claims that the seaward boundary was an ever moving line, and that a public easement extended over the subject property. [8 JA 1918-27.] The trial court found that the case of *People v. William Kent Estate Co.*, 242 Cal.App. 2d 156 (1966) required that the location of the seaward boundary of Lechuza's property be fixed in

accordance with the average location of the surveyed mean high-tide lines on the subject property. [8 JA 1917.] The court rejected the State's new-found position that a seaward boundary line on a widely fluctuating beach moves constantly in accordance with the mean high-tide line. *Id.* The Court further determined that the State wilfully ignored *Kent Estate*'s 30-year precedent, while putting forth no alternative basis to interpret the application of *Kent Estate* in Lechuza's case or in future seaward boundary disputes. *Id.*

With respect to the State's newly-crafted navigational easement claim, the Court found that the subject property is not subject to a public navigational or recreational easement landward of the seaward boundary. [8 JA 1921.] The court held that *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App. 3d 484 (1982), precluded the State's claim of a public navigational servitude. *Id. Aptos* established the rule that the public's rights do not extend to the area beyond the public tideland/private property boundary. 138 Cal.App. 3d at 505-6.

By Motion for Summary Judgment, the trial court also found that the State's actions had unconstitionally denied Lechuza of all economically viable use of its property. [15 JA 3956].

F. MEHOA's Failed Prescriptive Easement Action.

Separate from, but related to, the quiet title trial was MEHOA's claim against Lechuza that its members had acquired a "prescriptive easement" over the entire subject property. MEHOA's prescriptive easement claim was tried before Judge Richard Harris in the West District of the Los Angeles Superior Court, which on October 18, 1996, found MEHOA's claim to be meritless. [16 JA 4268-4305.] As Judge Harris explained:

> "What we have here is a political struggle. The interior lot owners obviously do not want the beach front lots to be built on. This has more to

do with view than with picnicking on the beach. To put it simply, the owners of the beach front lots don't have the votes to control the Association. . . . This is majority rule at its rawest." [16 JA 4293-94.]

"Here we do not have a public beach. This was a private development to begin with for the benefit of the lot owners in the Tract. The idea that such a property right can be obtained simply by walking on the beach and without ever having in mind a claim of hostile use, or 'planting the flag' of adverse possession is ludicrous." [16 JA 4301-02.]

G. Lechuza's Attempts To Obtain The Coastal Commission's Reconsideration Of Its Permit Applications.

Given that the Coastal Commission cited the lack of a "properly delineated seaward boundary" as grounds for its unconditional denial of Lechuza's permit applications, following the trial court's decision establishing Lechuza's seaward boundary, Lechuza repeatedly sought the Coastal Commission's reconsideration of its permit applications. [17 JA 4333-35, 4374-76, 4381, 4383-85, 4387-88.] Lechuza even offered to drop its damage claims if the Coastal Commission would reconsider its permit applications in light of the trial court's ruling. [17 JA 4374.] In all, Lechuza requested that the Coastal Commission reconsider its applications on six separate occasions, to no avail. [17 JA 4378-79.]

Lechuza then moved the trial court to remand the matter, and the trial court ordered the Coastal Commission to reconsider Lechuza's permit applications. [17 JA 4509.] The Coastal Commission refused to comply with the court's order and appealed. [18 JA 4708.]

Pursuant to Code of Civil Procedure 1110b, the trial court on December 30, 1996 granted Lechuza's request for

an order that the State's appeal not operate as a stay of execution of the order granting remand. [20 JA 5121.] The court found that Lechuza would suffer irreparable harm if forced to withstand further delay occasioned by a stay of the proceedings while the State pursued its appeals. *Id.*

> "The Court finds there is a showing by Plaintiff that it is also in the public interest that a stay not be granted . . . it is the public's funds that are fueling the State's efforts to continue this litigation by appealing the ruling of this Court with full knowledge of the adverse financial impact on the Plaintiff in this case and the lack of legal precedent for their position . . . there is an aspect of bad faith on the State's part in pursuing their legal theory in this case that, in the Court's opinion, is not in the public's interest." *Id.*

H. The Writ Of Supersedeas.

Just days before the Coastal Commission was prepared to reconsider Lechuza's permit applications, the State applied for immediate relief from the trial court's § 1110b order. En route to the February 4, 1997 Coastal Commission hearing in San Diego, counsel for Lechuza learned of the Court of Appeal's grant of a temporary stay. [20 JA 5156.] The Court of Appeal went on to fully consider the State's and MEHOA's appeal of the trial court's quiet title decision, regulatory takings determination and the order granting remand of Lechuza's permit applications.

I. The Court Of Appeal's First Decision.

In summary, the Court of Appeal's December 19, 1997 decision holds that the trial court erred by fixing the boundary as a stationary line based on the average of a number of surveys, and that the southerly boundary of Lechuza's lots is the mean high-tide line, which is an

ambulatory line which moves from day to day as a result of the shifting sandy shoreline. The Court also ruled, however, that the trial court did not err by denying the State a recreational easement in favor of public over Lechuza's private property based on the State's theory that wave uprush past the mean high-tide line constitutes navigable waters. With regard to MEHOA, the Court overturned the trial court's decision as to the location of MEHOA's easement, tying the location of such easement to the seaward boundary of the property.

> In directing the trial court's proceedings on remand the Court of Appeal stated that: "any judgment in the quiet title action must make clear that the southerly boundary line between Lechuza's property and the public tide lands is an ambulatory line which moves as described in this opinion. However, this does not preclude the parties from obtaining a judicial determination of such line's location as of any specific dates or date, assuming that such a determination would be useful in negotiation between the parties or in connection with Lechuza's future permit application." *Lechuza Villas West v. California Coastal Commission*, 60 Cal.App. 4th 218, 247, n. 20 (1997).

J. The State Lands Commission's New Determination Letter.

After the Court of Appeal's first decision, Lechuza requested a new State Lands Commission determination letter as to where Lechuza could propose development on its beachfront lots. On July 27, 1998, the State Lands Commission issued its latest determination letter in which it relies solely on a survey of the mean high-tide line as conducted on February 10, 1998, immediately following that year's heaviest El Nino storms. *See* Trial Exh. 403. The February 1998 El Nino survey is by far the most landward of any of the 60 available surveys of the

property. Without any legal authority or factual basis the State Lands Commission now states that it will object to any proposed development seaward of the most landward ever recorded mean high-tide line. *Id.*

K. The Trial On Remand.

Upon remand, a further bench trial was held before Judge Aurelio Munoz commencing on November 10, 1998. [27 JA 6729.] Pursuant to the Court of Appeal's first decision, the trial on remand was to provide a judicial determination as to the location of the southerly boundary line of the subject property as of a certain specific date or dates, and to provide such a determination as would be useful in negotiations between the parties or in connection with future permit applications regarding the subject property.

The trial court ultimately held that while the shoreline boundary of coastal property moves as the result of "gradual and imperceptible" accretion and erosion of the land adjoining tidal water, seaward boundaries do not change as a result of "avulsion," the sudden and violent action of the elements, perceptible while in progress, where the former boundary can be determined or where the land is reclaimed within a reasonable time. [27 JA 6730.] As a result, the trial court found that a mean high-tide line surveyed during or shortly after an avulsive event does not establish the location of the seaward boundary of the subject property. [27 JA 6730-31.]

Specifically, the trial court found that Lechuza had carried its burden of proof through percipient and expert testimony, photographs and other admissible evidence that the mean high-tide lines surveyed on six particular dates were located at positions resulting from sudden and perceptible events of avulsion, and therefore do not constitute the measurement of the southerly boundary of the subject property. [27 JA 6731.] The trial court found on each of those dates that the evidence proved that a

combination of high tides and increased storm activity resulted in sudden and perceptible episodes of avulsive erosion on the subject property. *Id.*

The trial court also found that the State's position that the Plaintiff's use of the property be restricted to areas landward of the most landward ever mean high-tide line "to be inequitable and without legal or factual basis." [27 JA 6731.] The trial court found that the State was seeking to obtain the benefit of all landward movements of the mean high-tide line while denying Lechuza any benefits of the seaward movements of the mean high-tide line. [27 JA 6731-32.]

With regard to MEHOA, the trial court found that MEHOA's position was best evidenced by the testimony of the only MEHOA member who testified, who stated that he believed that the subject property was for the public benefit and that the development of the subject property would deny him "his beach." [27 JA 6732.] The court found that the subject property is private property and does not belong to the public or to MEHOA or its individual members. [27 JA 6732-33.]

The State and MEHOA appealed the entirety of the trial court's decision. [28 JA 6950, 6953, 6965.]

L. The Second Court Of Appeal's Decision.

In its decision filed December 21, 2000, the Court of Appeal ignored all of the detailed factual findings made by the trial court in the trial on remand, and again reversed the trial court and repeated that no fixed boundary for the subject property could ever be determined. *See* Slip Op. at Appendix "B." Specifically, the lower court rejected the trial court's factual finding of avulsion, but could only do so by changing the century old avulsion rule and applying the change retroactively. While avulsion had long been defined as "sudden and perceptible" change in a shoreline boundary, the Court of Appeal here

has now added that avulsion must be "sudden, perceptible and unexpected." *See* Slip Op. at p. 14. Then, based only on the new "unexpected" requirement, the Court of Appeal rejected the trial court findings.

In reiterating its direct conflict with the First Appellate District in *Kent Estate*, the Second Appellate District reiterates its determination that a coastal boundary may not be fixed under any circumstance. *See* Slip Op. at p. 10. The Court of Appeal's new decision also directly conflicts with its specific instruction in its own first opinion that "the parties may obtain a judicial determination of the location of the property line as of any specific date or dates, assuming such a determination would be useful in the negotiations between the parties or in connection with Lechuza's future permit applications." *See Lechuza Villas West*, 60 Cal.App. 4th at 247, fn. 20. The Court of Appeal now states that it didn't mean what it said in urging the parties and the trial court to determine the property line as of any specific date or dates, and apologizes for that "comment on our part [which] unfortunately resulted in confusion rather than assistance." *See* Slip Op. at p. 17, n. 6.

M. Lechuza's Damages.

From the time of the Commission's January 10, 1991 permit denial, Lechuza has been unable to make any use of the subject property. [9 JA 2324.] To date, the State Lands Commission has refused to identify the exact boundary line the State alleges, and has refused to provide any determination letter which would allow any use of the subject property. [9 JA 2323.] The Coastal Commission will not accept any application for use of the subject property without an appropriate determination letter from the Lands Commission. [9 JA 2325.] Lechuza cannot even make an application to the Coastal Commission, let alone prove the location of the moving boundary, which

the Commission has stated it will require before approving any permit application. Lechuza now owes over $10 million on the property and is out of pocket more than $1,000,000 over the course of this over ten year long ordeal.

REASONS FOR GRANTING THE PETITION

I.

REVIEW IS REQUIRED TO RESOLVE A CONFLICT BETWEEN THE OPINIONS OF THE FIRST AND SECOND APPELLATE DISTRICTS

In the first Court of Appeal decision, a panel of the Second Appellate District ruled that "the legal boundary line [between tidelands and uplands] is ambulatory, not fixed." *Lechuza Villas West,* 60 Cal.App. 4th at 235. The court made clear, moreover, that the boundary line is "ambulatory" not merely in some abstract sense or in response to *long-term* changes in the shore's profile. Rather, the court accepted the State's argument that the boundary line is a "constantly shifting" one, that is, "a line which moves as the ordinary high tide (a fixed plane) intersects the shifting sands *from day to day.*" *Id.* (emphasis added). As the court itself recognized, this rule necessarily implies that the boundary between public and private property on a shifting sandy beach *cannot* be fixed by judicial decree:

> Any judgment in the quiet title action must make it clear that the southerly boundary line between Lechuza's property and the public tidelands is an ambulatory line which moves as described in this opinion.

Id. at 247 n.20.

In the second Court of Appeal decision, the same panel of the Second Appellate District again reiterates its determination that "Lechuza's southern property line is an ambulatory line" and that under any circumstance

"the trial court cannot establish an average property line." *See* Slip Op. at p. 10.

If the rule in the Second Appellate District is that the boundary between public tidelands and adjacent uplands is a constantly moving line that can never be fixed in a quiet title action, the rule in the First Appellate District is just the opposite. In *Kent Estate*, the latter court considered how to determine the public-private boundary in a situation where landward and seaward movements of sand on a beach occur in "offsetting pairs . . . of substantially the same distance each year." 242 Cal.App. 2d at 160-61. Faced with such a situation, the trial court in *Kent Estate* had, at the behest of the State of California as plaintiff, issued a decree that contemplated a "constantly moving" boundary line. *Id.* at 161. The First District reversed, ruling that the trial court should have made an effort to

> fix[ ] an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed [in order] to determine a *reasonably definite* boundary line.

Id. (emphasis added). Thus, the First District gave trial courts both the authority and the duty to fix a reasonably definite boundary line if it is possible to do so.

The first Court of Appeal decision attempted to minimize its conflict with the First District by asserting that *Kent Estate* had merely "suggested, *without so holding*," that the trial court should calculate an average line in order "to create a reasonably definite boundary line." *Lechuza Villas West*, 60 Cal.App. 4th at 238. At best, this is a strained reading of *Kent Estate*: when an appellate court reverses a trial court's judgment and instructs the trial court that a particular "effort *should* be made upon retrial," *Kent Estate*, 242 Cal.App. 2d at 161 (emphasis added), that instruction constitutes a "holding" in any sense of the word. In the second Court of Appeal decision, the Second District drops the pretense and now

admits that they "disagree with the holding in" *Kent Estate* that an average fixed property line can be determined. *See* Slip Op. at p. 14, fn. 5.

It is not necessary, however, to analyze every jot and tittle of the *Kent Estate* opinion in order to confirm the conflict between the First and Second Appellate Districts. That the First District has rejected constantly moving boundaries between public tidelands and adjacent uplands is apparent not only from *Kent Estate* itself but also from the court's opinions in subsequent stages of the same litigation and in other shoreline boundary litigation. Three years after the original appellate decision in *Kent Estate,* the case returned to the First District on a procedural matter regarding third-party joinder. The court described its prior holding in unmistakable terms:

> The [trial court's] judgment fixed the boundary as the ordinary high water mark "as it may fluctuate naturally from time to time." Company appealed. . . . We recognized that "the almost mathematical line bounding Blackacre" might not be achievable here, but *we could not accept an elasticity of description which permitted a boundary movement of 80 feet or more each year.* Accordingly, we reversed and remanded the case for new trial to attempt to determine an average of shore movement which would permit *fixing of a more constant boundary.*

People v. Superior Court (William Kent Estate Co.), 1 Cal.App. 3d 167, 169 (1969) (*Kent Estate II*) (emphasis added and citation omitted).[2]

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[2] In its zeal to deny the existence of a conflict, the court below tried to distinguish *Kent Estate* on the ground that the plaintiff there (the State of California) had "sued for injunctive relief (*not* quiet title)." *Lechuza Villas West,* 60 Cal.App. 4th at 236. This is formally true but also meaningless: as the court below conceded, the basis for the injunctive relief sought by the

More recently, *Kent Estate* was applied by the First District in resolving a dispute over the boundary between sovereign and private ownership along the shore of Clear Lake in Lake County. Like both *Kent Estate* and the present case, the dispute was governed by Civil Code § 830, which defines the boundary of property bordering a navigable lake by reference to the "low-water mark" (just as it defines the boundary of property bordering tidelands by reference to the "high-water mark"). In *County of Lake v. Smith,* 228 Cal.App. 3d 214, 225 (1991), the First District observed that its prior decision in *Kent Estate* had "rejected the theory that seasonal variation in the water line along tidal waters should cause the boundary to shift back and forth" and had "directed the trial court to fix the property line" between the publicly owned tidelands and the privately owned uplands. The court in *County of Lake* quoted approvingly *Kent Estate*'s admonition that "greater certainty should be possible than the constantly moving line contemplated by the present [lower court] decree." *Id.* (quoting 242 Cal.App. 2d at 161) (alteration in original).[3]

Thus, despite the lower court's understandable effort to deny or minimize the conflict created by its opinion, the conflict between the published opinions of the First

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State was its contention that "the [defendant's] fence extended into state property." *Id.; accord Kent Estate II,* 1 Cal.App. 3d at 169 (noting that the state's action "sought to abate the fence as a nuisance, *on the ground that it extended into [public] lands*" (emphasis added)). Thus, the outcome of the litigation turned completely on the location of the boundary between the state-owned tidelands and the privately owned uplands, the very issue litigated in the present case.

[3] For the sake of completeness, we point out that the conflict between the First and Second Appellate Districts is not confined to published opinions. This Court may wish to examine, among other cases, the prior history of *Marks v. Whitney,* 6 Cal. 3d 251 (1971).

Appellate District and the Second Appellate District regarding the boundaries between public tidelands and adjacent uplands is apparent. Only review by this Court can resolve that conflict.

II.

REVIEW IS REQUIRED BECAUSE THE COURT OF APPEAL DECISION CONFLICTS WITH CENTURY OLD TIDELANDS BOUNDARY LAW.

Pursuant to the Court of Appeal's specific instruction in its first decision, the trial on remand was to provide a judicial determination as to the location of the southerly boundary line of the subject property as of a certain specific date or dates, and to provide such a determination as would be useful in negotiations between the parties or in connection with future permit applications regarding the subject property. To that end, after extensive evidentiary proceedings, the trial court held that while the shoreline boundary of coastal property moves as a result "gradual and imperceptible" accretion and erosion of the land adjoining title water, seaward boundaries do not change as a result of "avulsion" the sudden and violent action of the elements, perceptible while in progress, where the former boundary can be determined or where the land is reclaimed within reasonable time. [27 JA 6730.]

The avulsion exception to the moving coastal boundary rule is as old as the rule itself. *See, County of St. Clair v. Lovingston*, 90 U.S. 46 (1874); *Nebraska v. Iowa*, 143 U.S. 359 (1891); *New Jersey v. New York*, 523 U.S. 767 (1998). Unfortunately, while the century old rule was good enough for the Second Appellate District to stick Lechuza with, the Court had to change the century old exception in order to reverse the trial court's correct legal findings. Specifically, for the first time ever, the Court of Appeal held that the avulsion doctrine requires that "avulsion must be not only 'sudden and perceptible,' but 'sudden,

perceptible, and unexpected.' " *See* Slip Op. at p. 14. Without this retroactive and unjustified change in the century old avulsion doctrine the trial court's opinion must be upheld.[4] While the lower court may want to change the rules mid-stream in order to fit its predetermined outcome of this matter, review must be granted in order to correctly determine the law of this State as to the doctrine of avulsion.

III.

REVIEW IS REQUIRED TO SETTLE IMPORTANT AND RECURRING LEGAL ISSUES REGARDING THE PROPER BOUNDARIES BETWEEN PUBLIC TIDELANDS AND ADJACENT UPLANDS ON CALIFORNIA'S WATERWAYS.

Including both coastline and offshore islands, the State of California has more than 1,500 miles of ocean shoreline. To this may be added hundreds more miles of inland tidal waterways, ranging from San Francisco Bay to tidally affected rivers as far inland as Sacramento. *See, e.g., State of California ex rel. State Lands Commission v. Superior Court (Lovelace)*, 11 Cal. 4th 50, 61 (1995) (crediting the Attorney General's references to the "thousands of acres along the shorelines of California's tide and submerged lands" and to the "thousands of persons owning property bordering on navigable waterways" in this state).

In light of these facts, it is hardly surprising that boundary disputes should arise with great frequency between the public, which own all the tidelands below the ordinary high-water mark, *See* Civil Code § 670, and

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[4] Of course Lechuza has had no opportunity to prove at trial whether it can meet this new third prong of the avulsion test. Given that the El Nino survey is by far the most landward survey ever taken, Lechuza might very well be able to meet this new "unexpected" requirement if given the chance to do so.

the owners of the adjacent uplands. Nor is it surprising that this Court has been called on to resolve tidelands boundary disputes on numerous occasions spanning nearly this entire century. *Compare Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 766 (1916) (resolving dispute over "ownership of a parcel of land in the city of Long Beach situated on the sand beach above the line of ordinary high tide"), *and City of Oakland v. Buteau*, 180 Cal. 83, 84 (1919) (resolving boundary dispute concerning "adjacent parts of a tract of land on the water front of Oakland") *with State of California ex rel. State Lands Commission v. Superior Court (Lovelace)*, 11 Cal. 4th 50, 56 (1995) (resolving dispute over ownership of "12 acres of dry land that used to be [a] riverbed . . . [whose] shores [were] tidelands"). These decisions, and many others, attest to the recurring nature of tidelands boundary disputes.

Because disputes over tidelands boundaries recur with great frequency, the correct formulation of the rules for resolving such disputes is of great importance. Of even greater importance, however, is whether courts can resolve tidelands boundary disputes at all, or whether (as the Court of Appeal has held in this case) courts are powerless to do any more than merely declare that the boundary between public tidelands and adjacent uplands is a constantly shifting line that moves from day to day. Several considerations confirm the significance of this issue.

A. The Same Considerations That Caused This Court To Deny The Parties' Joint Motion To Dismiss The Petition In *Lovelace* Apply To The Present Case.

Lovelace began as a quiet title action to determine the ownership of a mere 12 acres of land situated along the banks of the Sacramento River in the state's capital. *See* 11 Cal. 4th at 56. Applying the law of tidelands boundaries,

the court of appeal resolved this dispute against the State of California and in favor of private landowners, and the Attorney General petitioned for review by this Court. After this Court had granted review, however, the parties conditionally settled the case and filed a joint motion to dismiss the petition. *See id.* at 59-60.

Recognizing the importance of the tidelands boundary issues raised by the case, this Court refused to grant the joint motion to dismiss. Explaining its refusal, this Court first observed that, in his petition for review on behalf of the State, the Attorney General had represented that:

> "review is necessary to settle an important question of law affecting a longstanding rule of property designed to protect the public trust title to thousands of acres along the shorelines of California's tide and submerged lands," and that "the respective interests of the State and thousands of persons owning property bordering on navigable waterways is at stake."

Id. at 61. This Court further explained that, having "granted review partly due to these representations," it found no reason to believe that "the compelling reasons the Attorney General stated for us to resolve the issue had evaporated." *Id.* This Court also found "no reason to believe that similar disputes would not arise in other cases." *Id.*

These considerations apply here. The proper rules governing tidelands boundaries – and especially whether trial courts have the authority to "describe and define" tidelands boundary lines consistent with Public Resources Code § 6357 – affect thousands of acres along the tidal shorelines of California and determine the respective interests of thousands of persons owning property bordering on the ocean and other navigable waterways. As the Coastal Commission itself points out, "[a]lmost all California beaches vary dramatically in profile between winter and summer" and "the variation in

the width of a beach that can accompany that seasonal change can be over 200 feet." [10 JA 2585.] Given these dramatic and widespread seasonal variations, the uncertainties posed by the conflicting decisions of the First and Second Appellate Districts present, as the Attorney General argued in *Lovelace*, "an untenable situation for the State Lands Commission in the carrying out of its statutory mandate . . . in an equitable statewide fashion." 11 Cal. 4th at 61. As a result, this Court should, as it did in *Lovelace*, "exercise[its] discretion in favor of deciding this important legal issue of statewide importance." *Id.* at 62.

B. The Significance Of The Issue Presented For Review Is Magnified By The Longstanding Public Interest In Fixed And Certain Coastal Boundary Lines.

The ruling below also contravenes the long-standing public interest, recognized both by statute and by judicial decision, in fixed and certain boundary lines, particularly tidelands boundary lines. Numerous provisions of the California Code recognize the public interest that coastal boundary lines be certain. The Public Resources Code makes abundantly clear that tidelands boundaries may be fixed by agreement between the state and private parties. *See* Pub. Res. Code §§ 6342, 6357 and 6336. Other statutory law confirms that these boundary line agreements are intended to provide swift and lasting certainty to all parties involved: any such agreement "shall be conclusively presumed to be valid" unless held invalid in an appropriate judicial proceeding commenced within one year of the agreement's execution and recording. *See* Pub. Res. Code § 6341; Code Civ. Proc. §§ 760.020(b) and 764.080(a).

In contrast to the court below, the Legislature has determined that the public interest in establishing fixed tidelands boundary lines is not diminished by the fact that the ordinary high-water mark is subject to movement

by natural causes. Notwithstanding the possibility of such movement, the Legislature has mandated that

> [b]oundaries established by boundary agreements entered into and recorded pursuant to [provisions of the Public Resources Code], as to all parties thereto, shall be *fixed and permanent without change by reason of fluctuation due to the forces of nature.*

Pub. Res. Code § 6339(a) (emphasis added).

Consistent with the foregoing legislative directives, this Court too has recognized the public interest in fixed and certain tidelands boundary lines. Nearly 70 years ago, in *Muchenberger v. City of Santa Monica*, 206 Cal. 635 (1929), this Court resolved a dispute concerning the boundary between tidelands and uplands on the beaches of Santa Monica. Like the situation on Lechuza Beach,

> the shifting of the tide line from day to day, due to the action of the tides and waves, caused an uncertainty to exist as to the true location of the mean high-tide line, as to the exact boundary line between tidelands and the privately owned upland.

Id. at 639. The City of Santa Monica, "[f]or the purpose of removing the uncertainty," caused surveys to be made from which it established a line "as representing the mean high-tide line." *Id.* Because the line so established "was made straight in an endeavor to attain the *average* of a mean high-tide line," the line "did not exactly coincide with the mean high-tide line as it varied from day to day"; nevertheless, "the trial court [found] that it [was] a fair *average* line." *Id.* at 640 (emphasis added). The city and the upland property owner then executed a joint quitclaim deed, the city disclaiming any interest in the lands lying landward of the established line and the private landowner correspondingly disclaiming any interest in the lands lying seaward of the line. *See id.*

City residents challenged the city's quitclaim as constituting an alienation of public tidelands in violation of

what is now Article X, Section 3, of the state constitution. This Court rejected this challenge:

> It was not the purpose of the city in this case to transfer any titles, but to mark the boundaries of littoral holdings, *in order to make them certain and permanent*, and to prevent questions arising in the future concerning the ownership of lands on either side of the line agreed upon.

Muchenberger, 206 Cal. at 645 (emphasis added). More generally, this Court observed that "[n]o authorities" supported the plaintiffs' contention that "it is not permissible for a municipality to cause surveys to be made and to arbitrarily fix a line to be accepted as a mean high-tide line." *Id.* at 642. Accordingly, this Court upheld the agreement fixing a "certain and permanent" boundary between the city's tidelands and the uplands property. Significantly, this Court did so not in spite of, but *because of* "the finding that the mean high-tide line [at issue] is a shifting, uncertain line" and in explicit light of the "common and judicial knowledge that tide lines fluctuate." *Id.* (citing *Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 770 (1916)). *Muchenberger* was explicitly reaffirmed by this Court in *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 480 (1970).

When considered together with the boundary line agreement statutes discussed above, *Muchenberger* (and *Mansell*) make it abundantly clear that the public policy of California favors the "fixing and making definite and certain" the boundary between public tidelands and adjacent uplands whenever there is "an uncertainty as to . . . the exact boundary line," *Muchenberger*, 206 Cal. at 639-40, and that this policy is "wholly consistent with the meaning and purpose of" the state constitution, *Mansell*, 3 Cal. 3d at 480.

This public policy has no less application where, as in the present case, the uncertainty as to the boundary line results from "the shifting of the tide line from day to

day." *Muchenberger*, 206 Cal. at 639. The Lands Commission is authorized to fix definite and certain tidelands boundary lines by agreement, and a municipality may do so as well. "No authorities," *id.* at 642, can be cited for the notion that a court may not do the same when its jurisdiction is properly invoked. Indeed, judicial involvement in fixing tidelands boundaries is explicitly contemplated by statute: a method by which the Commission may seek to establish the ordinary high-water mark of tidelands is an "action to quiet title." Pub. Res. Code § 6357.

In short, the decision below contravenes what the First Appellate District has rightly called the long-standing "policy of the law to respect the legitimate interest of landowners in resolving . . . uncertainty [as to the true line]" between public and private property fronting California's waterways. *County of Lake v. Smith*, 228 Cal.App. 3d 214, 235 (1991). The importance of that policy, which has been given both legislative and judicial expression, should motivate this Court to grant the petition for certiorari.

C. The Significance Of The Issue Presented For Review Is Further Highlighted By The Potentially Devastating Effects On The Economic Viability Of Privately Owned Uplands Wrought By The Ruling Below.

The ruling below potentially destroys completely the economic viability of uplands property that is indisputably in private ownership more than 99% of the time. As the Coastal Commission described its own policy, one who proposes a project on beachfront property has the "burden of showing that [the] project would not encroach on publicly-owned tidelands." In combination with the ruling below that the boundary of such tidelands is an "ambulatory" line that moves "from day to day," this no-

encroachment policy effectively means that upland property owners cannot "develop or erect improvements seaward of *the most landward known location of the mean high tide line.*" This severe limitation holds even if that "most landward known location" is virtually always far to the landward of the changing mean high-tide line as it exists from day to day, even by tens of feet. Accordingly, property that is virtually always in private ownership (because it is landward of the ambulatory mean high-tide line) cannot be put to economically beneficial use by its owner (because at the same time it is seaward of the highest recorded mean high-tide line).

The implications of the State's policy, if it were given free reign by the courts, are staggering. Property owners up and down the state have built homes on beaches that erode enough during severe winter storms to cause the mean high-tide line to move landward of portions of the homes for a day or two. [10 JA 2585.] No doubt the mean high-tide line has moved landward of many more beachfront homes *at least one time in the past.* If the State were truly serious about enforcing its no-encroachment rule, it would be required as a matter of principle to seek the removal of all such homes.

The present litigation provides a trenchant example of these devastating effects. In a letter to the Coastal Commission urging it to deny Lechuza's permit applications, the Lands Commission asserted:

> [O]n average, the location of the mean high tide line would be located landward of [Lechuza's] stringline [*i.e.*, a line marking the most seaward extension of the project] and therefore within the project area *several days every year.* There is now substantial indication that the State's sovereign ownership *has* extended to land on which portions of the project would be located.

Lechuza Villas West, 60 Cal.App. 4th at 225. (emphasis added). In line with these assertions, the Coastal Commission denied Lechuza's permit applications based in

part on staff predictions that at least "1% of the time the [mean high-tide line] will be landward of the project" in the future and on "evidence that [such line] has been landward of the project" in the past. [10 JA 2572.] That is, the Court of Appeal's ruling ratifies an outcome in which Lechuza may build nothing at all on property that indisputably belongs to it 99% of the time (all but a few days per year) merely because the mean high-tide line "ambles" onto that property those few days. Combined with setbacks and minimum lot requirements, this outcome has resulted in Lechuza's inability to make *any* economically viable use of its beachfront lots for over a decade – no doubt the primary reason the first trial court found that Lechuza had suffered an unconstitutional taking of its property.

CONCLUSION

Review by this Court of the decision below is necessary to resolve a blatant and important conflict between the opinions of the First and Second Appellate Districts. Review is also necessary to correct the error of the Court of Appeal in its application of the century old rule of avulsion. Finally, review is necessary to settle important and recurring legal issues regarding the proper boundaries between public tidelands and adjacent uplands on California's waterways.

For the foregoing reasons, petitioner Lechuza Villas West respectfully urges this Court to grant this Petition for Certiorari.

DATED: August 2001

Respectfully submitted,

FRED GAINES
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APPENDIX

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LECHUZA VILLAS WEST, Plaintiff and Appellant, v. STATE LANDS COMMISSION et al., Defendants and Appellants.	B131770 (Los Angeles County Super. Ct. No. BC076855) (Filed Dec. 21, 2000)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Aurelio Munoz, Judge. Judgment affirmed as modified; order vacated.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, Joseph Barbieri, Deputy Attorney General, Vittal & Sternberg and Terence M. Sternberg for Defendants and Appellants.

Gaines & Stacey, Sherman L. Stacey, Fred Gaines and Lisa A. Weinberg for Plaintiff and Appellant.

Plaintiff Lechuza Villas West (Lechuza) sued defendants California Coastal Commission (Coastal Commission), State Lands Commission (Lands Commission), State of California, and Malibu-Encinal Atome Owners

Association (MEHOA) to quiet title to beachfront property in Malibu and to resolve certain disputes concerning Lechuza's proposed development of the property. The predominant issue in dispute was the location of the southern property line between Lechuza's property and the public tidelands. The present appeal arises from proceedings on remand after our reversal of an earlier judgment and interlocutory rulings in *Lechuza Villas West v. California Coastal Com.* (1997) 60 Cal.App.4th 218. In that opinion, we described the southern property line as an ambulatory line where the mean high tide meets the shifting sand on the shore from time to time, and directed the trial court to vacate its order defining the southern property line as a fixed line based on the average mean high tide line. (*Id.* at pp. 242, 247.) We stated that although the property line is ambulatory, the trial court on remand could specify the location of the property line on a particular date or dates. (*Id.* at p. 247, fn. 20.)

The trial court on remand conducted a new trial and entered a judgment describing the southern property line as ambulatory, but also declaring that, for purposes of negotiations between the parties and in connection with Lechuza's future permit applications, "any location of the mean high tide line landward of the location of 90% of the previous surveyed locations of the mean high tide line is the result of sudden and perceptible avulsive action, and therefore does not constitute the southerly boundary of the subject property." The judgment also states, "this Judgment does not define or limit where the owners of the subject property may have use of the subject property for the purpose of constructing homes."

Lands Commission and the state appeal the judgment, MEHOA appeals the judgment and a postjudgment order declaring that there is no prevailing party for purposes of attorney fees and costs, and Lechuza appeals the same postjudgment order.[1] Lands Commission and the state challenge the court's description of the southern property line on several grounds. MEHOA challenges the statement that the judgment does not determine where Lechuza may construct homes, contends it is entitled to recover attorney fees and costs as prevailing party, and also joins in Lands Commission's and the state's arguments. Lechuza contends it is entitled to recover attorney fees and costs from MEHOA, Lands Commission, and the state.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background and procedural history prior to the time of the first appeal are described at length in our prior opinion and will not be repeated here.

On remand, the parties disputed the meaning of this court's opinion and the scope of the proceedings to follow. Coastal Commission, Lands Commission, and the state maintained that our decision that the southern property line is ambulatory and our direction to the trial court that any judgment in the quiet title action must so state precluded further evidentiary proceedings to determine the location of the property line or to determine whether

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[1] Coastal Commission is not a party to the present appeal.

particular surveyed mean high tide lines were the product of avulsion. MEHOA also maintained that our opinion precluded further evidentiary proceedings concerning the location of the southern property line, and argued that a new trial should determine only the location of the northern boundary of its easement.

Lechuza maintained that our decision that the property line is ambulatory did not resolve the cross-complaint for declaratory relief by Lands Commission and the state seeking a declaration that Lechuza cannot build seaward of the most landward known location of the mean high tide line. Lechuza sought a determination rejecting that position and also requested a new trial to determine whether particular surveyed mean high tide lines were the product of avulsion. It argued that our opinion did not preclude a determination that particular surveyed mean high tide lines were the product of avulsion.

The trial court interpreted footnote 20 of our opinion[2] to allow a new trial to determine the location of the highest and lowest of the surveyed mean high tide liens and the "mean, the mode, and the medium." It concluded

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2 "Any judgment in the quiet title action must make it clear that the southerly boundary line between Lechuza's property and the public tidelands is an ambulatory line which moves as described in this opinion. However, this does not preclude the parties from obtaining a judicial determination of such line's location as of any specific date or dates, assuming that such a determination would be useful in negotiations between the parties or in connection with Lechuza's future permit applications." (*Lechuza Villas West v. California Coastal Com., supra*, 60 Cal.App.4th at p. 247, fn. 20.)

that our prior opinion did not preclude a determination that particular surveyed mean high tide lines were the product of avulsion. It also decided that the new trial would determine the northern boundary of MEHOA's easement, as directed in our prior opinion.

The parties presented evidence at the nonjury trial in November 1998 indicating the surveyed location of the mean high tide line on 60 separate occasions from approximately 1932 to 1998. Lechuza's expert and percipient witnesses testified that the six surveys indicating the most landward mean high tide lines had taken place after severe storms and were the product of avulsion. They testified that the shore profile moved horizontally by approximately 80 feet from winter to summer but maintained the same mean position from year to year and was stable over time. They testified further that at times waves caused sand to collapse in the wave uprush zone, above the mean high tide line, forming vertical scarps, that the shore profile moved horizontally at the same time, and that some witnesses had personally observed the sudden formation of scarps on the shore. Lechuza maintained that six of the surveys reflected such "avulsive" movement of the shoreline and offered in evidence a map of the property depicting a line seaward of the mean high tide lines measured in those six surveys and landward of the mean high tide lines measured in the remaining 90 percent of the surveys (the *90-percentile line*).

Lands Commission and the state presented expert testimony to the effect that the term "avulsion" does not refer to coastal storm activity, that changes in the mean high tide line are not visible or perceptible during storm

activity, and that the changes in the mean high tide line were not extraordinary.

The court issued a statement of decision in February 1999 stating that the mean high tide lines measured on six days in February 1993; January, February, and March 1995; February 1996; and February 1998 resulted from avulsion and therefore did not determine the southern property line on those dates. It stated that, for purposes of negotiations between the parties or in connection with Lechuza's future permit applications, any location of the mean high tide line landward of the 90-percentile line is the result of avulsion and does not constitute the southern property line. It rejected Lands Commission's and the state's contention that Lechuza cannot build seaward of the most landward surveyed location of the mean high tide line. It also restated the express terms of MEHOA's recorded easement, which is defined by reference to the southern property line, and stated that Lechuza and MEHOA reserved their rights to determine in a later action where Lechuza can build on the property.

The court entered a judgment on February 11, 1999, stating among other things that (1) the southern property line is the mean high tide line as it moves from day to day; (2) for purposes of negotiations between the parties or in connection with Lechuza's future permit applications, any location of the mean high tide line landward of the 90-percentile line is the result of avulsion and does not constitute the southern property line; (3) MEHOA's easement rights are as stated in the recorded easement; (4) Lechuza and MEHOA reserve their rights to determine in a later action where Lechuza can build homes; (5) "As a result, this Judgment does not define or limit where

the owners of the subject property may have use of the subject property for the purpose of constructing homes;" and (6) Lechuza is the prevailing party entitled to costs incurred at trial. Lechuza served notice of entry of judgment on February 12, 1999.

MEHOA filed a notice of intention to move for new trial on March 1, 1999, and Lechuza filed a motion for attorney fees and costs against MEHOA and the state on that date. MEHOA's new trial motion challenged the court's determination that Lechuza w the prevailing party, argued that MEHOA should be declared the prevailing party entitled to attorney fees and costs, and asked the court to modify the judgment accordingly. MEHOA and Coastal Commission, Lands Commission, and the state also moved to strike or tax the attorney fees and costs claimed by Lechuza on the ground that Lechuza was not the prevailing party, and on other grounds. The court continued the hearing on all four motions to April 19, 1999.

The court denied MEHOA's motion for new trial, denied Lechuza's motion for attorney fees and costs, and granted the motion to tax costs by Coastal Commission, Lands Commission, and the state on April 19, 1999. It decided that there was no prevailing party because Lechuza had not achieved its primary litigation objective of establishing a fixed property line and MEHOA had not achieved its objective of establishing an easement over substantially all of Lechuza's beach property. Although the court denied the motion for new trial, it granted MEHOA's request to modify the judgment in lieu of ordering a new trial (Code Civ. Proc., § 662). On April 21,

1999, it entered an amended judgment that is substantially the same as the original judgment of February 11 except that it does not declare Lechuza to be the prevailing party entitled to costs incurred at trial, awards MEHOA and the state costs on appeal as directed in our prior opinion, and declares that each party is to bear its own costs and attorney fees incurred at trial.

CONTENTIONS

Lands Commission and the state challenge the court's description of the southern property line on several grounds, including that (1) our decision that the southern property line is ambulatory and the statement in our opinion that "the only evidence was that the changes to the shoreline between Lechuza's property and that of the State were gradual, imperceptible, and the result of natural causes" precluded the trial court from determining that some of the changes in the mean high tide line were the product of avulsion; (2) the seasonal movement of an ocean shoreline is not avulsion as a matter of law; (3) the rapid, perceptible formation of one-foot scarps on the shore above the mean high tide line during a storm is not evidence of avulsion; (4) avulsion refers only to extraordinary movement in a body of water, not regular movement even if it is rapid and perceptible; and (5) the trial court had no authority to limit the landward movement of the property line to the 90-percentile line.

MEHOA joins in Lands Commission's and the state's arguments and also contends (1) the statement that the judgment does not determine where Lechuza may construct homes is prejudicial error because it indicates that

Lechuza "can build over all or any portion of the Easement as it may desire," and (2) MEHOA is entitled to recover attorney fees and costs from Lechuza under Civil Code section 1354, subdivision (f).

Lechuza contends it is entitled to recover attorney fees and costs from MEHOA under Civil Code section 1354, subdivision (f), and from Lands Commission and the state under Code of Civil Procedure section 1021.5.

DISCUSSION

1. *The Amended Judgment*

The amended judgment reflects the rulings on MEHOA's motion for new trial, Lechuza's motion for attorney fees and costs, and the motion to tax costs by Coastal Commission, Lands Commission, and the state. We conclude the court had no authority to enter the amended judgment, and the original judgment as amended by the postjudgment order on attorney fees and costs is the sole appealable judgment.

A trial court must rule on a motion for new trial within 60 days after the earlier of the service of notice of entry of judgment or the filing of notice of intention to move for new trial. (Code Civ. Proc., § 660.) If the court fails to rule on the motion within that time, the motion is denied by operation of law. (*Ibid.*) An order purporting to rule on a motion for new trial, including an order to modify the judgment in lieu of granting a new trial, made after the 60-day period is beyond the court's jurisdiction and void. (*Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101; *Tuck v. Tuck* (1966) 245 Cal.App.2d 260, 263.)

The trial court's ruling on the new trial motion on April 19, 1999, and its modification of the judgment pursuant to the ruling both occurred more than 60 days after the service of notice of entry of judgment on February 12, 1999, and therefore were void. (Code Civ. Proc., § 660; *Siegal v. Superior Court, supra,* 68 Cal.2d at p. 101; *Tuck v. Tuck, supra,* 245 Cal.App.2d at p. 263.)

Lands Commission, the state, and MEHOA appealed from the amended judgment within 30 days after the denial by operation of law of the new trial motion. Their notices of appeal would be timely if taken from the original judgment. (Cal. Rules of Court, rule 3(a).) Since no party has been misled or prejudiced, we construe the notices of appeal from the amended judgment to be from the original judgment. (Cal. Rules of Court, rule 1(a); *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 362.) The order dated April 19, 1999, was appealable as a postjudgment order (Code Civ. Proc., § 904.1(a)(2)), from which MEHOA and Lechuza timely and expressly appealed.

2. *The Southern Property Line*

Lechuza's southern property line is an ambulatory line where the plane of mean high tide meets the shifting sand on the shore. (*Lechuza Villas West v. California Coastal Com., supra,* 60 Cal.App.4th at p. 242.) The judgment on remand limits the movement of the property line, apparently at any time past or future, by reference to the 90-percentile line. This was error. Just as the trial court cannot establish a fixed average property line (*id.* at p. 245), it cannot retrospectively or prospectively limit the

movement of the property line by reference to an average line, a percentile line, or any fixed line.

We are aware of the practical problems confronting property owners who share an ambulatory boundary, particularly with respect to the construction of improvements on land whose ownership may change from time to time. To establish a fixed property line based on an average mean high tide line or to limit the future movement of the property line based on its historical changes, however, would deprive the upland property owner of littoral property and access to the water when the actual mean high tide line is below the fixed property line and would deprive the state and the public of tidelands when the actual mean high tide line is above the fixed property line. (*See* Comment, *Fluctuating Shorelines and tidal Boundaries: An Unresolved Problem* (1969) 6 San Diego L.Rev. 447, 467-468; *State of Cal. ex. rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 63-64 [stating that the state owns tidelands in trust for the public]; Cal. Const., art. X, § 3 [generally prohibiting the alienation of tidelands].) Again, we hold that the property line moves as the mean high tide line moves.

3. *Avulsion*

Avulsion is said to be the sudden, perceptible change in the location of a body of water. (*State of Cal. ex. rel. State Lands Com. v. Superior Court, supra,* 11 Cal. 4th at p. 63, fn. 1; 9 Powell on Real Property (2000) Accretion, § 66.01[1], p. 66-5.) When a body of water defines a property boundary, the property line generally changes as the location of the body of water changes, provided

that the movement is gradual, imperceptible, and the result of natural causes (i.e., accretion, reliction, or erosion).[3] (*State of Cal. ex. rel. State Lands Com. v. Superior Court, supra,* 11 Cal.4th at pp. 66-73; *City of Los Angeles v. Anderson* (1929) 206 Cal. 662, 667.) The sudden and imperceptible movement of a body of water, or avulsion, however, generally does not alter the property line, which remains where it was prior to the avulsion. (*Butts v. Cummings* (1953) 117 Cal.App.2d 432, 433; *Bohn v. Albertson* (1951) 107 Cal.App.2d 738, 748; see *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 469 [dictum]; 9 Powell on Real Property, *supra,* § 66.01[2] at p. 66-7.)

The rules of accretion, reliction, erosion, and avulsion derive from Roman law, were expressed in English common law, and are expressed in the common law and statutory law of many states. (See *County of St. Clair v. Lovingston* (1874) 90 U.S. 46, 66-68; *Nebraska v. Iowa* (1891) 143 U.S. 359, 361-364; Sohm, The Institutes (Ledlie 3d ed. 1907) § 64, p. 323; Buckland, A Text-Book of Roman Law from Augustus to Justinian (3d ed. 1963) § 77, p. 211; 2 Blackstone's Commentaries 262; 9 Powell on Real Property, *supra,* § 66.01[2] at pp. 66-5 to 66-10.) Although the reasons for the different treatment of avulsion on the one

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[3] Accretion is the gradual, imperceptible accumulation of land due to the action of a body of water. Reliction is the exposing of land due to the gradual receding of a body of water. (*State of Cal. ex. rel. State Lands Com. v. Superior Court, supra,* 11 Cal.4th at p. 63, fn. 1; 9 Powell on Real Property, *supra,* § 66.01[1] at pp. 66-2 to 66-4.) Erosion is the gradual loss or covering of land due to the action of water. (9 Powell on Real Property, *supra,* § 66.01 at pp. 66-4 to 66-5; 4 Tiffany, Law of Real Property (3d ed. 1975) Accretion, § 1219, p. 1071.)

hand and accretion, reliction, and erosion on the other are difficult to discern with certainty, the principal reason appears to be that the parties to a conveyance defining the boundary by reference to a body of water presumably contemplated the gradual movement of the water line and boundary, but did not contemplate sudden, avulsive movement. (4 Tiffany, Law of Real Property, *supra*, § 1222 at p. 1083; see also *id.* § 1219 at pp. 1070-1071 [discussing various asserted rationales for the rules of accretion]; 9 Powell on Real Property, *supra*, § 66.01[3] at pp. 66-10 to 66-15 [same].)

Some courts have held that sudden, perceptible changes in the location of a body of water were not avulsion where the body of water was known to be subject to sudden movement. (See, e.g., *Nebraska v. Iowa*, *supra*, 143 U.S. at pp. 369-370 [Missouri River]; *Oklahoma v. Texas* (1922) 260 U.S. 606, 637-638 [Red River]; *City of Corpus Christi v. Davis* (Tex.App. 1981) 622 S.W.2d 640, 646 [Corpus Christi Bay]; 9 Powell on Real Property, supra, § 66.02[1] at pp. 66-19 to 66-20.) Although the stated rationale in those cases sometimes varied or was not clearly stated, in our view the determining factor should be the reasonable expectations of the parties based on the nature of the body of water.

Nebraska v. Iowa held that the "rapid and visible" washing away of the Missouri River banks was not avulsion and therefore changed the boundary between two states (the varying centerline of the river). The court noted that periodic turbulent rises in the river waters were "well known" and "not strange," although it did not state that that was the reason for its holding. (143 U.S. at pp. 368-370.) The holding apparently was based on the

fact that although the erosion was sudden and perceptible, the soil was not carried away and attached to the other bank in a solid mass, so that the accretion was not sudden and perceptible.[4] (*Id.* at p. 369.) The court held further, however, that in one location where the winding river had suddenly cut through the land and formed a new channel, the law of avulsion applied and the boundary was not changed. (*Id.* at p. 370.)

Oklahoma v. Texas held that "rapid and material" changes caused by rises in the Red River were not avulsion, because "the habit of this river is so like that of the Missouri" that the rule from *Nebraska v. Iowa* applied. (260 U.S. at p. 637.)

City of Corpus Christi v. Davis considered *Nebraska v. Iowa* and other cases, and concluded that "erosion can be both sudden and perceptible, and does not have to be always gradual and imperceptible." (622 S.W.2d at pp. 645-646.) Since "[t]he Texas coast is subject to frequent northers and hurricanes, just as the Missouri, Rio Grade and Red Rivers are subject to violent rises and strong currents," the court held that sudden changes to the shoreline caused by the strong winds were not avulsion. (*Id.* at p. 646.)

In our view, in light of these authorities and the apparent purpose of the avulsion doctrine, avulsion must be not only "sudden and perceptible," but "sudden, perceptible, and unexpected." Sudden and perceptible

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[4] Of course, the centerline of the river changes as the soil rapidly erodes from one of the banks, regardless of where that soil is later deposited.

changes that are within the reasonable expectation of persons familiar with the body of water are not avulsion. Seasonal changes and periodic storms are common and expected along the California coast and therefore do not cause avulsion.[5] An avulsive event must be more extraordinary and unexpected, such as a river changing its course or a similarly unexpected event affecting the ocean shoreline.

The doctrine of avulsion typically applies to rivers and streams that overflow their banks or change course (see, e.g., *Butts v. Cummings, supra,* 117 Cal.App.2d at p. 433), but it applies to oceans as well (see *New Jersey v. New York* (1998) 523 U.S. 767, 784; *People v. Wm. Kent Estate Co., supra,* 242 Cal.App.2d at p. 160; *Bohn v. Albertson, supra,* 107 Cal.App.2d at p. 748; *Schwartzstein v. B.B. Bathing Park* (1922) 203 App.Div. 700 [197 N.Y.S. 490, 493]; 2 Shalowitz, Shore and Sea Boundaries (1962) p. 539). Whether a particular movement constitutes avulsion is a mixed question of law and fact involving the application of law to the facts and "a critical consideration, in a factual context, of legal principles and their underlying values," which we review de novo. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

Lands Commission and the state contend our prior opinion held that the changes to the shoreline were not avulsive and precluded the trial court from determining

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[5] We disagree with the holding in *People v. Wm. Kent Estate Co.* (1966) 242 Cal.App.2d 156, 160, that an 80-foot change in the width of the shore did not affect the property line because that regular seasonal change was not gradual and imperceptible.

otherwise. We disagree. The holding in our prior opinion that the property line is ambulatory and cannot be defined by a fixed average mean high tide line was based on undisputed evidence that the topography of the shore changes from time to time, so the place where the mean high tide meets the shore also changes. It was not necessary to decide that all the shoreline movement was gradual and imperceptible and none of it was avulsive to determine that the property line moves from time to time, as long as there was evidence that some of the movement was gradual and imperceptible and therefore altered the property line. Although we stated that all the evidence indicated that the changes to the shoreline were gradual, imperceptible, and the result of natural causes (*Lechuza Villas West v. California Coastal Com., supra,* 60 Cal.App.4th at pp. 235 & 236, fn. 13), that statement was not necessary to our determination that the property line is ambulatory and therefore is not binding as law of the case. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212; *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498.)

The evidence indicates that the most landward surveyed mean high tide lines were the result of seasonal storm activity and periodic climate changes. Although there is evidence that some sudden changes in the topography of the shore were perceptible as they occurred (specifically, changes in the place where the plane of mean high tide meets the shore), that does not compel the conclusion that those movements constituted avulsion, *if the sudden changes were within the reasonable expectation of persons familiar with the body of water at that location.* Lands Commission and the state presented uncontradicted expert testimony that the strong wave activity preceding

the most landward measurements of the mean high tide line, particularly during the 1998 El Nino storms, was within the anticipated range of periodic wave activity and was not a "100-year storm." Moreover, the frequency of the purportedly avulsive winter storms, occurring six times in five years, and the regularity with which the shore profile continues to return to a stable mean position year after year indicate that the changes in the shoreline on those occasions were not extraordinary and cannot be deemed to be beyond the contemplation of parties subject to an ambulatory property line defined by the water boundary. We conclude that the changes in the mean high tide line were not avulsion.

4. *Establishing the Property Line's Historical Range of Movement*

Lechuza sought a judicial determination of the location of the property line on various dates over the past 70 years, which the trial court elected to express in terms of the 90-percentile line. As we now hold, however, the historical movement of the property line does not limit the movement of the present boundary. A judicial determination of the location of the property line on various dates in the past therefore would serve no valid purpose in this quiet title action, the purpose of which is to determine present interests in the property.[6] (See Code Civ. Proc., §§ 761.020, 764.010.)

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[6] The statement in our prior opinion that the parties may obtain a judicial determination of the location of the property line "as of any specific date or dates, assuming that such a determination would be useful in negotiations between the parties or in connection with Lechuza's future permit

The principal purpose of Luchuza's efforts to delimit the historical range of movement of the property line is to cause the Coastal Commission to allow Lechuza to build on that part of the property that Lechuza maintains historically has been north of the moving property line. We conclude that the trial court cannot predetermine the Coastal Commission's decision. Lechuza must seek a decision from the Coastal Commission in the first instance as to where on the property Lechuza can build. That decision will then be subject to judicial review under the appropriate standard of review for an administrative agency decision. (Pub. Resources Code, § 30801; Code Civ. Proc., § 1094.5.)

The trial court is not the proper forum to determine in the first instance matters that may affect the Coastal Commission's decision such as the historical range of movement of the property line, even if those matters are based on legal determinations as to the historical movement of the property line. (Cf. *State of California v. Superior Court* (1974) 12 Cal.3d 237, 249-250 [held that the developer first must obtain a determination from the predecessor of the Coastal Commission concerning its

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applications" (*Lechuza Villas West v. California Coastal Com., supra,* 60 Cal.App.4th at p. 247, fn. 20) was based on the optimistic assumption that such a determination might have served a useful purpose in a negotiated resolution of this matter. If that turned out to be so, we did not want to restrict the trial court's ability to assist the parties in that regard. It is now apparent that this comment on our part unfortunately resulted in confusion rather than assistance.

claim of a vested right in connection with a permit application and that it could not maintain an action for declaratory relief in the first instance].) For the trial court to delimit the historical movement of the property line before the Coastal Commission has had an opportunity to consider the proposed permit application would supplant the coastal Commission's decision on a matter that presumably is within the agency's expertise concerning coastal properties, and would intrude upon the agency's decisionmaking process. Moreover, if the matter is resolved in the administrative process, judicial intervention will not be necessary. (See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391.)

The Coastal Commission denied Lechuza's prior permit applications in January 1993 based on its determination that from time to time the mean high tide line extends north of the southern boundary of Lechuza's proposed development and that Lechuza had failed to satisfy its burden to show that the project would not encroach on the public tidelands. The decision was based on historical surveys of the mean high tide line, excluding the six recent measurements that Lechuza now contends were the product of avulsion. Judge Robert H. O'Brien denied Lechuza's petition for writ of mandate in this action challenging the Coastal Commission's decision, but Judge Ernest M. Hiroshige later ordered the matter remanded to the Coastal Commission to reconsider the applications. We reversed the remand order (*Lechuza Villas West v. California Coastal Com., supra,* 60 Cal.App.4th at p. 246), so the trial court's denial of Lechuza's writ petition remains the operative ruling with respect to the permit denial. If Lechuza applies for

another permit, the Coastal Commission's new decision will be subject to judicial review in a similar manner. Lechuza cannot circumvent the process by obtaining a judicial determination of matters on which the Coastal Commission may base its new decision before the Coastal Commission decides.

5. *Lechuza's Proposed Construction of Homes*

The statement in the judgment that "this Judgment does not define or limit where the owners of the subject property may have use of the subject property for the purpose of constructing homes" states only what the judgment does not decide. It does not state either expressly or impliedly that Lechuza has a right to build homes on any part of the property, as MEHOA argues. Since MEHOA has not shown prejudice, it cannot show reversible error. (Cal. Const., art VI, § 13; Code Civ. Proc., § 475.)

6. *Attorney Fees and Costs*

Our modification of the judgment makes it necessary to vacate the postjudgment order determining that there was no prevailing party based on the results obtained in the judgment and also to strike that part of the judgment declaring Lechuza the prevailing party. We express no opinion as to who is the prevailing party or whether any party has prevailed under the judgment as modified, but leave that determination to the sound discretion of the trial court.

DISPOSITION

The amended judgment of April 21, 1999, is void and of no effect. Those parts of the judgment of February 11, 1999, describing the southern property line as the 90-percentile line (pp. 2-3, carryover para.) and declaring Lechuza the prevailing party are stricken, and the judgment is affirmed as modified. The trial court's order of April 19, 1999, determining that there is no prevailing party is vacated. Lands Commission and the state are entitled to costs on appeal against Lechuza. Lechuza and MEHOA are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We Concur:

KITCHING, J.

ALDRICH, J.

APPENDIX B

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SUPERIOR OCURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

LECHUZA VILLAS WEST, a California General Partnership, Petitioner/Plaintiff, v. CALIFORNIA COASTAL COMMISSION, a State Agency; STATE OF CALIFORNIA, and DOES 1 through 20, inclusive, Respondents/Defendants. AND RELATED CROSS-ACTIONS	CASE NO: BC 076 855 JUDGMENT TRIAL DATE: November 10, 1998 DEPT: 47 The Honorable Aurelio Munoz

(Filed Feb. 11, 1999)

Upon remand from the Court of Appeal, this matter came on regularly for bench trial in Department 47 of this

Court, the Honorable Judge Aurelio Munoz presiding. Fred Gaines and Sherman L. Stacey of Gaines & Stacey appeared on behalf of Plaintiff Lechuza Villas West, L.P. ("Plaintiff"). Joseph Barbieri and Joseph Rusconi, Deputy Attorneys General, appeared on behalf of Defendants and Cross-Complainants the State of California and the State Lands Commission ("State"). Terrence M. Sternberg of Vittal & Sternberg appeared on behalf of Defendant and Cross-Complainant Malibu Encinal Home Owners Association, Inc. ("MEHOA").

The trial having commenced on November 10, 1998, and concluded on November 30, 1998, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

1. ***In Resolution of the First and Second Causes of Action in the Plaintiff's First Amended Complaint:*** In accordance with the Statement of Decision issued November 21, 1994, the Petition for a Writ of Mandate is denied and the First and Second Causes of Action are dismissed.

2. ***In Revolution of the Third, Fourth and Fifth Causes of Action in the Plaintiff's First Amended Complaint:*** The Third, Fourth and Fifth Causes of Action, which pertain to Plaintiff's claim that its property has been taken in violation of the federal and state constitutions, are dismissed.

3. ***In Resolution of the Sixth, Seventh and Eighth Causes of Action in the Plaintiff's First Amended Complaint and All Causes of Action in the State's Cross-Complaint:*** The subject property consists of Lots 141-156 of Tract 10630 as recorded in Book 181, pages 6-11 of Maps in the official records of the County Recorder of Los

Angeles. The parties bound by this quiet title decree are: Lechuza Villas West, a California limited partnership and Norman Haynie, its sole general partner; the State of California, acting by and through the State Lands Commission; the Malibu-Encinal Home Owners Association, Inc., a California Mutual benefit corporation; the Law Offices of Reznik and Reznik; American Reconveyance Services, Inc., a California corporation; the Curci-Turner Co.; J.A.M.S., Inc.; John Curci, Trustee of the Curci Revocable Trust No. 2; Sean Michael Irrevocable Living Trust; Star Sapphire, Inc., a California corporation; and Mark Cirlin.

In accord with the Court of Appeal's ruling, the southerly boundary of the subject property is the ordinary high water mark, which is represented by the location of the mean high tide line along the subject property as it moves from day-to-day by gradual and imperceptible degrees.

However, the Court finds that, for the purpose of negotiations between the parties or in connection with Plaintiff's future permit applications, any location of the mean high tide line landward of the location of 90% of the previous surveying locations of the mean high tide line is the result of sudden and perceptible avulsive action, and therefore does not constitute the southerly boundary of the subject property.

The subject property is not encumbered with any public easement landward of the ordinary high water mark.

4. ***In Resolution of All Causes of Action in MEHOA's Cross-Complaint:*** As to the First and Second

Causes of Action, this Judgment quiets title in and to the easement over and upon the subject property as described in Paragraphs 21 and 28 of the Declaration as to the Establishment of Conditions, Restrictions, Covenants, Reservations, Liens and Charges Affecting that Certain Real Property Known as Malibu Encinal ("CC&Rs"), recorded in the Los Angeles County Recorder's Office on September 6, 1932, by holding that it is:

a) Of a width of twenty-five feet (25') bounded on the south and measured inland from the southerly boundary as it is located along said Lots 141-156;

b) Except that when the northerly line of said easement is at an elevation greater than five feet (5') above said southerly boundary, the line at which said five foot (5') elevation lies is the northerly line of the easement;

c) Provided that in no event shall the easement be of a width of less than ten feet (10') measured inland from the southerly boundary.

In accord with the Court of Appeal's ruling, the Third Cause of Action is dismissed.

Plaintiff has reserved such rights and remedies as it may have to seek in any subsequent action a determination of where it can build homes in light of this Judgment and the CC&R's. MEHOA has reserved such rights and remedies as it may have as against any such subsequent action. As a result, this Judgment does not define or limit where the owners of the subject property may have use of the subject property for the purpose of constructing homes.

IT IS FURTHER ORDERED ADJUDGED AND DECREED THAT:

Plaintiff is the prevailing party herein and shall recover its costs incurred in the trial court in connection with this action.

DATED: FEB 11 1999

AURELIO MUNOZ /s/
THE HONORABLE
AURELIO MUNOZ
Judge of the
Superior Court

APPENDIX C

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COUNTY OF LOS ANGELES

LECHUZA VILLAS WEST, a California General Partnership, Petitioner/Plaintiff, v. CALIFORNIA COASTAL COMMISSION, a State Agency; STATE OF CALIFORNIA, and DOES 1 through 20, inclusive, Respondents/Defendants. AND RELATED CROSS-ACTIONS	CASE NO: BC 076 855 STATEMENT OF DECISION TRIAL DATE: November 10, 1998 DEPT: 47 The Honorable Aurelio Munoz

(Filed Feb. 11, 1999)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

Upon remand from the Court of Appeal this matter came on regularly for bench trial in Department 47 of this Court, the Honorable Judge Aurelio Munoz presiding. Fred Gaines and Sherman L. Stacey of Gaines & Stacey appeared on behalf of Plaintiff Lechuza Villas West, L.P. (Plaintiff'). Joseph Barbieri and Joseph Rusconi, Deputy Attorneys General, appeared on behalf of Defendants and Cross-Complainants the State of California and the State Lands Commission ("State"). Terrence M. Sternberg of Vittal & Sternberg appeared on behalf of Defendant and Cross-Complainant Malibu Encinal Home Owners Association, Inc. ("MEHOA"). The trial commenced on November 10, 1998, and concluded on November 30, 1998.

The Court of Appeal Decision resulted in a final determination on the First, Second, Third, Fourth, and Fifth Causes of Action in the Plaintiff's First Amended Complaint. In addition, the Court of Appeal Decision finally resolved the Third Cause of Action of MEHOA's Cross-Complaint. As a result, the trial on remand involved resolution of the Sixth, Seventh and Eighth Causes of Action of the Plaintiff's First Amended Complaint, all Causes of Action in the State's Cross-Complaint, and the First and Second Causes of Action in MEHOA's Cross-Complaint.

I.

SUMMARY OF THE ISSUES TRIED.

This matter involved the determination of the location of the southerly seaward boundary of 16 beachfront lots, lots 141-156 of Tract 10630 as recorded in Book 181,

pages 6-11 of Maps in the official records of the County Recorder of Los Angeles ("subject property"). This matter also involved the State's claim of a public navigational servitude over all portions of the subject property covered from time to time by the ebb and flow of the ocean tide. Finally, this action involved MEHOA's claim of an express easement over the subject property based on language in the Covenants, Conditions and Restrictions ("CC&Rs") affecting Tract 10630.

The Court of Appeal, Second Appellate District, Division Three, filed its Decision in this matter on December 19, 1997, remanding the matter to this Court for issuance of Judgment. Specifically, the Court of Appeal instructed this Court that:

> "Any judgment in the quiet title action must make it clear that the southerly boundary line between Lechuza's property and the public tidelands is an ambulatory line which moves as described in this opinion. However, this does not preclude the parties from obtaining a judicial determination of such line's location as of any specific date or dates, assuming that such a determination would be useful in negotiations between the parties or in connection with Lechuza's future permit applications."

See Court of Appeal Decision, at fn. 20.

II.

DECISION.

A. The Court Finds That The Location Of The Seaward Boundary Of The Subject Property Is The Mean High Tide Line Except In Cases Of Avulsion.

In accord with the Court of Appeal Decision, the southerly boundary of the subject property is the ordinary high water mark, which is represented by the location of the mean high tide line along the subject property as it moves from day to day by gradual and imperceptible degrees. The parties had stipulated to the accuracy of some 60 different surveyed locations of the mean high tide line as represented numerically in Trial Exhibit 400. With the exceptions as discussed below, the southerly boundary of the subject property was located at the mean high tide line as represented in Trial Exhibit 400 on the specific dates included thereon.

California law is clear that the movement of a shoreland boundary may only occur as a result of "gradual and impeceptible" accretion and erosion of land adjoining tidal water. Seaward boundaries do not change as the result of "avulsion," the sudden or violent action of the elements, perceptible while in progress, where the former boundary can be determined or where the land is reclaimed within a reasonable time. As presented at trial, the Court takes notice that the Joint Committee of the American Congress of Surveying and Mapping and the American Society of Civil Engineers defines "avulsion" relative to shorelands as the "rapid erosion of shorelands from waves during a storm." As a result, a mean high tide line surveyed during or shortly after an avulsive

event does not establish the location of the seaward boundary of the subject property.

Specifically, the Court finds that the Plaintiff has carried its burden of proof through percipient and expert testimony, photographs and other admissible evidence that the mean high tide lines surveyed on February 27, 1993, January 27, 1995, February 17, 1995, March 22, 1995, February 8, 1996, and February 10, 1998, are located at positions resulting from sudden and perceptible events of avulsion, and therefore do not constitute a measurement of the southerly boundary of the subject property.

In each of these instances the evidence before the Court proved that a combination of high tides and increased storm activity resulted in sudden and perceptible episodes of erosion on the subject property. The Court finds to be credible the testimony of Plaintiff's expert Mr. Brown who testified that the erosion of vertical sand scarps on the subject property could be witnessed as it was occurring and that a one foot erosion of such a sand scarp could result in as much as a ten foot landward movement of mean high tide line on the subject property. The Court finds the testimony of the State's experts, Dr. Seymour and Mr. Gadd, that such incidents are not unusual, or do not constitute avulsion, to be contrary to the evidence before the Court and not credible.

For the purpose of negotiations between the parties or in connection with Plaintiff's future permit applications, the Court finds that any location of the mean high tide line landward of the location of 90% of the previous

surveyed locations of the mean high tide line, as represented on Trial Exhibit 419, is the result of sudden and perceptible avulsive action, and therefore does not constitute the southerly boundary of the subject property. The Court finds that the evidence was overwhelmingly clear that each of the mean high tide lines surveyed landward of the 90 percentile line were the result of sudden and perceptible episodes of erosion caused by high tides combined with increased storm activity.

The Court finds that the State's position that the Plaintiff's use of the property be restricted to areas landward of the most landward ever recorded mean high tide line to be inequitable and without legal or factual basis. The State seeks to obtain the benefit of all landward movements of the mean high tide line, while denying Plaintiff any benefits of the seaward movements of the mean high tide line. Such unfairness is exemplified by the undisputed evidence that even after the severe El Nino storms early in 1998, resulting in the most landward mean high tide line ever recorded on the subject property, the subject property recovered much of its sand within a few weeks, and the mean high tide line as measured later in 1998 was as far seaward as had been measured since 1932.

B. The Court Finds That MEHOA's Express Easement Is As Defined In the CC&Rs.

Pursuant to the stipulation of the parties, the Court finds that MEHOA's express easement over the subject property is as described in paragraphs 21 and 28 of the Declaration of Establishment of Conditions, Restrictions,

Covenants, Reservations, Liens and Charges affecting that certain real property known as Malibu Encinal ("CC&Rs"), recorded in Los Angeles County Recorder's Office on September 6, 1932. As stated in the CC&Rs, MEHOA's easement is:

A) Of a width of twenty-five feet (25') bounded on the south and measured inland from the southerly boundary as it is located along said Lots 141-156;

B) Except that when the northerly line of said easement is that in elevation greater than five feet (5') above said property said southerly boundary line at which said five foot (5') elevation lies as the northerly line of the easement;

C) Provided that in no event shall the easement be of a width of less than ten feet (10') measured inland from the southerly boundary.

Also by stipulation, Plaintiff has reserved such rights and remedies as it may have to seek in any subsequent action a determination of where it can build homes in light of this Decision and the CC&Rs, and MEHOA reserves such rights and remedies as it may have as against any such subsequent action. As a result, this Decision does not define or limit where the owners of the subject property may have use of the subject property for the purpose of constructing homes.

At trial, MEHOA's position was best evidenced by the testimony of Mr. Dixon who testified that he believed that the subject property was for the public benefit and that the development of the subject property would deny him "his beach." For the purposes of negotiations between the parties or in connection with Plaintiff's

future permit applications, this Court finds that the subject property is private property and does not belong to the public or to MEHOA or its individual members.

III.

CONCLUSION

As detailed above, this Court finds that Plaintiff has carried its burden of proof that certain of the mean high tide lines surveyed to date with regard to the subject property do not constitute the southerly boundary of the subject property. In particular, the most landward surveyed mean high tide lines, surveyed during or after severe winter storms which caused avulsive erosion on the subject property, do not constitute the southerly boundary of the subject property as had been claimed by the State and MEHOA.

This Court will retain jurisdiction of this matter for the purpose of determining all other matters the Court may appropriately determine.

DATE: FEB 11 1999

AURELIO MUNOZ/s/
THE HONORABLE AURELIO MUNOZ
Judge of the Superior Court

APPENDIX D

Court of Appeal, Second Appellate District,
Division Three – No. B131770
S094898

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Mar. 14, 2001)

LECHUZA VILLAS WEST,
Plaintiff and Appellant,

v.

STATE LANDS COMMISSION,
Defendants and Appellants, et al.

Petition for review DENIED.

GEORGE
Chief Justice

Supreme Court, U.S.
FILED
SEP 4 2001
OFFICE OF THE CLERK

No. 01-0279

In The

Supreme Court of the United States

LECHUZA VILLAS WEST,
a California limited partnership,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, STATE OF CALIFORNIA, STATE LANDS COMMISSION and MALIBU-ENCINAL HOME OWNERS ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeals, Second Appellate District

OPPOSITION OF STATE OF CALIFORNIA AND CALIFORNIA STATE LANDS COMMISSION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION OF STATE OF CALIFORNIA AND CALIFORNIA STATE LANDS COMMISSION TO PETITION FOR WRIT OF CERTIORARI

Lechuza Villas West has filed a petition for a writ of certiorari in which it seeks review of a California appellate court decision resolving a quiet title action in favor of the State of California. Lechuza's petition concerns the application of the California rule of avulsion to seasonal erosion on a coastal shoreline. Lechuza does not suggest that this issue implicates any question of federal law.

Because Lechuza's petition solely presents issues of state real property law, its petition should be denied. *E.g.*, *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

Dated: September 4, 2001

Respectfully submitted,

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